

ARKANSAS SUPREME COURT

No. CR 08-1164

CHRISTOPHER LEE DUNN
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered February 26, 2009

PRO SE MOTION TO WITHDRAW
APPEAL [CIRCUIT COURT OF
GRANT COUNTY, CR 98-10, HON.
PHILLIP H. SHIRRON, JUDGE]

MOTION DENIED; APPEAL
DISMISSED.

PER CURIAM

In 1998, appellant Christopher Lee Dunn entered guilty pleas in Grant County Circuit Court to charges of capital murder and attempted capital murder and received an aggregate sentence of life imprisonment without parole. In 2008, appellant filed a petition for writ of habeas corpus in that court requesting certain scientific testing and alleging actual innocence. The trial court dismissed the petition and appellant lodged an appeal of that order in this court. The briefs have been filed and appellant brings this motion in which he asks to withdraw the appeal on the basis that his petition for writ of habeas corpus was not filed in the proper court.

Any petition for writ of habeas corpus to effect the release of a prisoner is properly addressed to the circuit court in the county in which the prisoner is held in custody, unless the petition is filed pursuant to Act 1780 of 2001 Acts of Arkansas, codified as Arkansas Code Annotated §§ 16-112-201 – 16-112-208 (Repl. 2006). *Lukach v. State*, 369 Ark. 475, 255 S.W.3d 832 (2007) (per curiam). Here, appellant filed his petition for the writ under Act 1780 because he alleged actual innocence. Ark. Code Ann. § 16-112-103(a)(2) (Repl. 2006). A proceeding under Act 1780 is properly

commenced in the court in which the conviction was entered. Ark. Code Ann. § 16-112-201(a) (Repl. 2006). We do not, therefore, grant the motion.

We do, nevertheless, dismiss the appeal. This court has consistently held that an appeal of the denial of postconviction relief will not be permitted to go forward where it is clear that the appellant could not prevail. *Booth v. State*, 353 Ark. 119, 110 S.W.3d 759 (2003) (per curiam). Here, it is clear that appellant's petition was not timely filed in the trial court.¹

Section 16-112-202(10) provides that a motion for relief under Act 1780 must be made in a timely fashion. Section 16-112-202(10) further provides for a rebuttable presumption against timeliness for any motion not made within thirty-six months of the date of conviction and lists five grounds by which the presumption may be rebutted. To overcome the presumption against timeliness, a petitioner must establish, in the petition, one of the grounds listed in section 16-112-202(10)(B). *Douthitt v. State*, 366 Ark. 579, 237 S.W.3d 76 (2006) (per curiam). Under the act, a petitioner may establish that his petition is timely through a showing that incompetence substantially contributed to the delay, that the evidence to be tested is newly discovered, or that a new method of technology that is substantially more probative than prior testing is available. A petitioner may rebut the presumption based upon a claim that denial would result in manifest injustice, but may not do so solely through an assertion of his innocence. A petitioner can also rebut the presumption through other good cause. *See id.*

Appellant filed his petition almost ten years after appellant's conviction; the petition is presumed to be untimely. Appellant did not establish in the petition any of the grounds listed in

¹ The State argues in its brief that Act 1780 relief was not available to appellant because he entered a guilty plea. We do not need to address that issue because it is clear that the petition was not timely filed.

section 16-112-202(10)(B).

Appellant raised allegations of incompetence in his petition, but not incompetence that contributed to the delay in bringing his petition for Act 1780 relief. Appellant alleged that he was incompetent from drug use at the time of his arrest and confession, but did not assert that incompetence continued.

Appellant requested testing of a bag and other items found at the crime scene. He indicated these items were found during the murder investigation. Appellant did not allege the items were newly discovered.

Appellant requested these items to be subjected to fingerprinting, DNA testing, and X-ray fluorescence testing or other trace metal detection. Fingerprinting and DNA testing were both available at the time of appellant's conviction. Even if trace metal detection testing was not available at the time of appellant's conviction, he failed to establish that this new testing would be probative of his innocence.

We construe section 16-112-202(10)(B) to require a showing that the new testing is more probative of a petitioner's innocence. *Scott v. State*, ___ Ark. ___, ___ S.W.3d ___ (Mar. 6, 2008) (per curiam). In order to demonstrate that testing is more probative of a petitioner's innocence, the petition must identify a theory of defense that complies with section 16-112-202(6). Appellant's petition under Act 1780 did not identify any theory of defense that might have been presented at trial utilizing the requested test results. As a result, appellant failed to demonstrate that the requested testing had any potential to be probative.

The claims in appellant's petition did not establish any manifest injustice that might result other than through appellant's assertion of his innocence. The petition did not rebut the presumption

of untimeliness through any demonstration of other good cause. Appellant's petition clearly failed to show grounds as required to establish that his petition was timely. Accordingly, we dismiss the appeal because the trial court correctly dismissed the petition and appellant cannot prevail on appeal.

Motion denied; appeal dismissed.